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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER NEAR CHICAGO,
ILLINOIS ON MAY 25, 1979

SYED HAIDER, as Administrator of the Estate
of VICTORIA CHEN HAIDER, Deceased,

Petitioner,

vs.

McDONNELL DOUGLAS CORPORATION, a corporation;
and AMERICAN AIRLINES, INC., a corporation,

Respondents.

IN RE AIR CRASH DISASTER NEAR CHICAGO,
ILLINOIS ON MAY 25, 1979

INGE MARIA KAHL, Special Administrator of the Estate
of HANS JURGEN KAHL, deceased, et al.,

Petitioners,

vs.

AMERICAN AIRLINES, INC. and McDonnell
DOUGLAS CORPORATION,

Respondents.

**BRIEF IN OPPOSITION TO PETITIONS FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

THOMAS D. ALLEN

ROBERT E. HALEY

RUTH E. VAN DEMARK

Attorneys for Respondent,

American Airlines, Inc.

Of Counsel:

WILDMAN, HARROLD, ALLEN & DIXON

One IBM Plaza, Suite 3000

Chicago, Illinois 60611

(312) 222-0400

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STATEMENT OF THE CASE

A number of assertions made in the Statement of the Case found in the petition filed by Inge Maria Kahl¹ are incomplete or inaccurate and require amplification and correction.

¹ This brief is in opposition to two petitions for writ of certiorari filed from *In re Air Crash Disaster Near Chicago, Illinois on May 25,*

(Footnote continued on following page)

An action on behalf of the Estate of Hans Jurgen Kahl was indeed filed in the Circuit Court of Cook County on May 29, 1979. On the same day, however, an action was filed on behalf of the estate in the United States District Court for the Northern District of Illinois. While it is true that the state court action, No. 79 L 11305, was later removed to federal court, the removed action, No. 79 C 2307, was dismissed on September 29, 1981. The case of *Inge Maria Kahl, Special Administrator of the Estate of Hans Jurgen Kahl v. American Airlines, Inc. and McDonnell Douglas Corporation*, No. 79 C 2175, has been pending in the United States District Court for the Northern District of Illinois since May 29, 1979.

Petitioner Kahl's statement that the Seventh Circuit has "decided that the substantive law of Illinois (as set forth in the Illinois Wrongful Death Act) would apply to . . . [the 150 cases removed to or brought in federal courts]" is not accurate. Kahl Petition at 3. The Seventh Circuit has made no such holding. Both the Seventh Circuit and the United States District Court for the Northern District of Illinois have emphasized the importance of the state of the domicile of the decedents and the plaintiffs in their choice of law in these cases. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 613 (7th Cir. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 633, 637 (7th Cir. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*,

(Footnote continued from preceding page)

1979, 701 F.2d 1189 (7th Cir. 1983). The petition filed on behalf of the Estate of Victoria Chen Haider, *Syed Haider, as Administrator of the Estate of Victoria Chen Haider v. McDonnell Douglas Corp. and American Airlines, Inc.*, No. 82-2129 (filed June 27, 1983), and that filed on behalf of the Estate of Hans Jurgen Kahl and twenty other estates, *Inge Maria Kahl, Special Administrator of the Estate of Hans Jurgen Kahl, deceased, et al. v. American Airlines, Inc. and McDonnell Douglas Corporation*, No. 82-2149 (filed June 29, 1983), will be referred to in this brief as the Haider Petition and the Kahl Petition, respectively.

526 F. Supp. 226, 228 n.2 (N.D. Ill. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 480 F. Supp. 1280, 1283 (N.D. Ill. 1979). Neither court has made a blanket ruling that the law of Illinois is to apply in all pending cases. Both *In re Air Crash Disaster*, 644 F.2d 633, and the action below involved Illinois decedents and Illinois plaintiffs. Consequently, the law of Illinois was followed. Illinois domicile is not necessarily the factual situation in each of the twenty estates represented by the Kahl Petition.

SUMMARY OF ARGUMENT

Before the court below were two separate and very distinct issues: (1) whether, in a wrongful death diversity action, state law would require the admission of evidence of the deceased's past and future income tax liability and (2) whether, in the same action, state law would prohibit an instruction informing the jury that any damages it might award would not be subject to federal income taxes.

Contrary to the assertions in the petitions for writ of certiorari filed with this Court, the United States Circuit Court of Appeals for the Seventh Circuit in resolving these issues did not ignore Illinois law, "apply" *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), or "challenge" the validity of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See Kahl Petition at 5. While the resolution of each issue, like the issues themselves, differed, the Seventh Circuit's determinations that evidence of a deceased's tax liability is admissible in a wrongful death action and that a jury instruction on the nontaxability of any award can be given in a diversity action in federal court were thoroughly grounded in considerations of state law and are in full conformity with the decisions of other federal courts of appeal. No special or important reasons justifying a grant of certiorari are raised by the petitions before this Court. Sup. Ct. R. 17.1. The petitions should be denied.

ARGUMENT

I.

The Seventh Circuit correctly ruled that Illinois courts would allow evidence of a decedent's tax liability in a wrongful death action.

In granting the motion of the plaintiff to bar any evidence of the impact of tax liability on the decedent's earnings, the United States District Court for the Northern District of Illinois, while conceding a lack of controlling Illinois law on the subject, summarily concluded that "Illinois law precludes . . . admission of this evidence." *In re Air Crash Disaster*, 526 F. Supp. at 231. The Seventh Circuit disagreed. Although it discussed at length the sometimes precarious balance and difficult interchange in diversity actions between the admissibility of relevant evidence under the applicable Federal Rules of Evidence and the definition of relevance under apparently conflicting but nonetheless controlling substantive state law, the Seventh Circuit finally and squarely held that "Illinois' substantive measure of damages is identical to the FELA measure [announced by this Court in *Liepelt, supra*], leaving the district court free to admit all evidence relevant to that measure under Fed.R.Evid. 402." *In re Air Crash Disaster*, 701 F.2d at 1195.

Finding a total lack of controlling precedent decided by the Illinois Supreme Court on the admissibility of evidence of tax liability in wrongful death actions, the court below carefully and correctly scrutinized decisions of the Illinois Appellate Court, Illinois' Wrongful Death Act, and the policies underlying that statute and damage awards generally to determine what the Illinois Supreme Court would decide if confronted with the issue of the impact of a decedent's tax liability in a wrongful death action. That the court did not err in its finding or holding is readily apparent.

The Illinois Supreme Court has never addressed the issue of the admissibility of a decedent's income tax liability in a wrongful death action. Nonetheless, both petitioners attempt to portray the Illinois Supreme Court's 1955 decision in *Hall v. Chicago & North Western Railway Co.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955), as, if not controlling, persuasive precedent. Haider Petition at 15; Kahl Petition at 8-9, 12. It is neither. An FELA, personal injury case involving the propriety of an attorney's remarks to the jury about the nontaxability of any award it might return, *Hall* only tangentially touched on the admissibility of evidence of a plaintiff's tax liability when the court noted that "the trial judge during the course of the trial ruled that on the issue of earning capacity evidence of gross earnings before taxes was proper." *Id.* at 149, 125 N.E.2d at 85. "This ruling," the court observed, "appears to be in accord with the weight of authority." *Id.* Whether the ruling actually was in accord with the weight of authority was not decided and, because it was not before the court, need not have been decided. More importantly, even if the ruling had been affirmed and formally adopted by the Illinois Supreme Court, the court's decision would be neither persuasive nor controlling in a wrongful death action where the survivor, unlike a personal injury victim, is allowed to recover only what the decedent would have contributed to his or her future support. Net income, in other words, not gross income, is the measure of damages in Illinois in a wrongful death action. *Hall* is simply without application.

In the absence of any controlling decision of the Illinois Supreme Court, the Seventh Circuit properly considered the decisions of the Illinois Appellate Court. There, the Seventh Circuit found confirmation of its finding that the Illinois Supreme Court has not determined the admissibility of income tax evidence in a wrongful death action as well as an indication of how the state's intermediate state court would rule if presented with the issue. In *Peluso v. Singer General Precision, Inc.*, 47 Ill. App. 3d 842, 365 N.E.2d 390 (1st Dist. 1977), an appeal from a jury award in a wrongful death action, the

appellate court was faced with a defense contention that the trial court erred when it refused to allow cross-examination of the plaintiff's economist on the effect of income taxes on the deceased's future earnings. Because the issue had not been properly preserved for appeal and because the defendants could not show that they were prejudiced as a result of the trial court's ruling, the appellate court declined to "adopt a rule of law for this jurisdiction" on such a basis. *Id.* at 854, 365 N.E.2d at 400. In so doing, however, the court acknowledged both that the dicta in *Hall, supra*, was not controlling and "the importance of the issue." *Peluso*, 47 Ill. App. 3d at 854, 365 N.E.2d at 400. In his concurring opinion, Presiding Justice Sullivan specifically emphasized:

Hall, relied upon by plaintiff, is not controlling of the issue here. It held in a personal injury action that a jury should not be informed that its damage award would not be subject to income tax and, while the application of *Hall* prohibits informing a jury in either a death or a personal injury action that the amount of its award of damages would not be taxable, it does not hold that defendant in a death action may not develop the fact that pecuniary loss was a net amount to be determined after deductions for taxes and personal expenses.

Id. at 857, 365 N.E.2d at 401-02.

Having found that the guidance from Illinois' intermediate court to suggest how the Illinois Supreme Court might rule if directly faced with the evidentiary issue of a deceased's income tax liability in a wrongful death action, the Seventh Circuit, in its opinion, looked to the Wrongful Death Act itself and the articulated policies underlying the Act and damage awards generally. In both the Act and those policies, the Seventh Circuit found the final and necessary evidence to support its prediction of how the Illinois Supreme Court would rule.

Section 2 of Illinois' Wrongful Death Act allows for the award of damages which are "a fair and just compensation with reference to the pecuniary injuries resulting from... [the

wrongful] . . . death." Wrongful Death Act § 2, Ill. Rev. Stat. ch. 70, § 2 (1981). Illinois courts have consistently, in the words of the court below, "interpreted this statute to permit recovery only of the amount the survivor would have received from the decedent but for the death." *In re Air Crash Disaster*, 701 F.2d at 1197. See, e.g., *Peluso*, 47 Ill. App. 3d at 856-57, 365 N.E.2d at 401 ("The measure of damages under the Wrongful Death Act is the pecuniary loss to the beneficiaries occasioned by the death. . . . Pecuniary loss has traditionally been held to consist of the value of the sum of monetary contributions and personal services the deceased would have provided"). This consistent interpretation of damages under the Wrongful Death Act is coupled with an overall policy of insuring that compensatory damages are indeed compensatory. Consequently, as a general practice, Illinois courts admit evidence to permit economic adjustment to damage awards in order to make those awards compensatory. See cases cited in *In re Air Crash Disaster*, 701 F.2d at 1198. Precisely because of "the kind of evidence that Illinois courts would, or in fact do, entertain in measuring damages," the Seventh Circuit was confident of its ability to predict "the course the Illinois Supreme Court would endorse were the issue [of the tax liability of a decedent in a wrongful death action] presented to it." *Id.*

Far from reflecting "little or no evidence" (Kahl Petition at 12), the Seventh Circuit's conclusion that, if confronted with the issue, the Illinois Supreme Court would allow evidence of a decedent's income tax liability in a wrongful death action was based on meticulous review and analysis of Illinois case law, its Wrongful Death Act, and judicial practice. Yet, despite this meticulous review and analysis and the soundness of its conclusion, both petitioners suggest that the court was imposing a federal standard based on *Liepert* in diversity cases.² The

² The insinuation found on page 7 of the Kahl Petition that the Seventh Circuit's statement that Rule 403 of the Federal Rules of

(Footnote continued on following page)

Seventh Circuit was doing no such thing. What the Seventh Circuit did is what the United States District Court for the Southern District of New York recently did when, faced with precisely the same issue, it looked to decisions of the New York Court of Appeals and, finding no controlling decisions, analyzed the decisions of intermediate courts, New York's Wrongful Death Statute, and the state's general policies. *Lin v. McDonnell Douglas Corp.*, 3 Av. L. Rep. (CCH) (17 Av. Cas.) 18,285 (S.D.N.Y. Apr. 12, 1983), *supp. and amend. by*, No. 79 Civ. 3195(RWS), slip op. (S.D.N.Y. Apr. 26, 1983). As did the Seventh Circuit, the United States District Court for the Southern District of New York concluded that the state's highest court "when . . . faced with this issue . . . will decide that consideration by the jury of would-be tax liability is necessary for the proper assessment of pecuniary loss to the distributees of a decedent in a wrongful death action . . ." *Id.* at 18,290.

Neither the court below nor the court in *Lin* "applied *Liepel*" in the diversity actions before them. Although both courts recognized the possibility of an "*Erie* conundrum" arising from the admission of relevant evidence under the Federal Rules of Evidence and the exclusion of otherwise

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Evidence "would displace any similar state rule in federal court" (*In re Air Crash Disaster*, 701 F.2d at 1199) applies "to prohibit the admissibility of evidence of a decedent's tax liability" (Kahl Petition at 7) is particularly misleading and pernicious. The court's statement refers specifically to Rule 403, not to Rule 401, and to the exclusion of relevant evidence because any probative value of the evidence is outweighed by another factor. The statement arises in the context of the court's discussion of *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982), where the Illinois Supreme Court refused to allow a wrongful death award to reflect lost investment earnings. The Illinois Supreme Court's decision rested not on the issue of the relevancy of the lost earnings but on their *de minimis* value. The evidence was excluded not because it was not relevant but because of "considerations of undue delay . . . [or] . . . waste of time, . . ." Fed. R. Evid. 403.

relevant evidence under substantive state law, neither court was required to solve that conundrum. See *In re Air Crash Disaster*, 701 F. 2d at 1195. Only if the court below had found that the Illinois Supreme Court would not, if presented with the issue, admit evidence of a decedent's tax liability in a wrongful death action, would the court below have had to resolve the *Erie* questions. Whether it would have ruled, as the district court did, that the state law controls or whether it would have found that the Federal Rules of Evidence control is a matter of purest speculation. Such speculation is not grounds for the grant of a writ of certiorari.

II.

The Seventh Circuit correctly ruled that an instruction concerning the nontaxability of a jury's award can be given in a federal court diversity action controlled by Illinois law.

In determining whether the district court erred in barring evidence of the decedents' income tax liability, the Seventh Circuit did not have to decide conflicting state and federal law and procedure. *Erie* was never reached. In determining whether the district court erred in refusing an instruction concerning the nontaxability of jury awards, *Erie* was met. The court's determination that the district court erred in barring the instruction was rooted in a review of Illinois law and involved an analysis of that law under this Court's holdings in *Delaware v. Prouse*, 440 U.S. 648 (1979), and *Liepelt, supra*. That review and analysis required the application of the principles of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1955). The court's conclusion that Illinois law does not prohibit the giving of a nontaxability instruction in a federal wrongful death diversity action governed by Illinois law rests securely on that review, analysis, and application.

No one—not the petitioners, not the respondents, not the court below—has suggested that Illinois trial courts presently instruct juries in personal injury and wrongful death cases that

their awards will not be subject to taxation under the Internal Revenue Code. This practice stems from the Illinois Supreme Court's holdings in *Hall, supra*, and in another FELA case, *Raines v. New York Central Railroad Co.*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972). Since the overruling of *Hall* and *Raines* by *Liepelt*, the practice has been upheld in non-FELA state court actions. See *Ciborowski v. Philip Dressler & Associates*, 110 Ill. App. 3d 981, 443 N.E.2d 618 (1st Dist. 1983), *appeal denied*, — Ill. 2d — (1983); *Johnson v. Hoover Water Well Service*, 108 Ill. App. 3d 994, 439 N.E.2d 1284 (2d Dist. 1982); *Newlin v. Foresman*, 103 Ill. App. 3d 1038, 432 N.E.2d 319 (3d Dist. 1982); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 432 N.E.2d 920 (1st Dist. 1982). With the exception of *Newlin*, where the court held that "juries should not be instructed on the tax consequences of damages awards" (*Newlin*, 103 Ill. App. 3d at 1046, 432 N.E.2d at 325), all of the Illinois post-*Liepelt* non-FELA cases have, in their holdings, couched the practice of refusing the instruction in optional terms. See *Ciborowski*, 110 Ill. App. 3d at 987, 443 N.E.2d at 622 ("the income tax jury instruction is not required"); *Johnson*, 108 Ill. App. 3d at 1009, 439 N.E.2d at 1294 ("The Illinois Supreme Court has ruled that it is not error to refuse to instruct the jury as to the taxability of an award"); *Christou*, 104 Ill. App. 3d at 262, 432 N.E.2d at 925 ("In Illinois the income tax instruction is not required"). Although it would appear not to be error to give the instruction in an Illinois state court action, the instruction is nonetheless not given.

Illinois state courts do not instruct juries that their awards are not subject to taxation. Under Rule 51 of the Federal Rules of Civil Procedure, a district court is empowered to instruct the jury and would give the nontaxability instruction in a comparable FELA case. The court below was, therefore, presented with an *Erie* question. Since, in a diversity action, "state law determines the substance of the instructions given . . . [but] . . . federal law and the Federal Rules of Civil Procedure control

the manner and method of instructing the jury," the court below carefully analyzed Illinois law to determine whether the state court practice of refusing the instruction involves an issue of substantive law and interest or whether it is itself a matter of "manner or method." 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 51.02-1 (2d ed. 1982).

The Seventh Circuit's analysis of Illinois decisions refusing instructions concerning the nontaxability of jury awards revealed that those decisions have both a substantive component and procedural aspects. The substantive component is found in *Hall* and rests on the mistaken assumption, specifically rejected by this Court in *Liepert*, 444 U.S. at 496 n.10, that the nontaxability of jury awards was intended by Congress as an additional benefit for the successful plaintiff. See *Hall*, 5 Ill. 2d at 152, 125 N.E.2d at 96 ("if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified"). See also *Raines*, 51 Ill. 2d at 430, 283 N.E.2d at 232. The only other justifications, also advanced in *Hall*, for refusing to give the instruction are purely procedural: if a jury is properly instructed, there is "no purpose in mentioning anything about the award not being subject to Federal income tax" and an instruction about the nontaxability of a jury award would lead "*ad infinitum*" to other instructions of a similar nature. *Hall*, 5 Ill. 2d at 150, 151, 125 N.E.2d at 85, 86.

In determining whether it was obligated to follow Illinois courts in deciding whether the district court had erred in not permitting the nontaxability instruction to be given, the court below correctly followed the mandates of this Court. Based on this Court's decision in *Delaware v. Prouse*, 440 U.S. at 653, the court below held that it could review Illinois' declared substantive interest in the practice because it is premised on federal law. Because this Court specifically rejected the interpretation given by the Illinois Supreme Court to section 104(a)(2) of the

Internal Revenue Code in *Liepelt*, 444 U.S. at 496 n.10, the Seventh Circuit was not bound to follow the practice and, indeed, properly rejected the notion that an injured party is entitled to "the possibility of a windfall, beyond the stated measure of damages [under the Internal Revenue Code]." *In re Air Crash Disaster*, 701 F.2d at 1199. Stripped of any valid substantive interest, the Illinois practice of barring the nontaxability instruction involves nothing more than a procedural rule to prevent the giving of a superfluous instruction which, in turn, would give rise to more superfluous instructions. As a procedural rule, it is in direct conflict with the state's own substantive law which requires damages to be compensatory in wrongful death actions as well as with Rule 51 of the Federal Rules of Civil Procedure which invests a district court with the right to choose the manner and method of instructing juries in diversity actions. See, e.g., *Hopkins v. Metcalf*, 435 F.2d 123, 124 (10th Cir. 1971) ("Although in a diversity action state law determines the substance of instructions, the grant or denial of instructions is controlled by federal law and the Federal Rules of Civil Procedure"). In 1955, this Court held that a South Carolina state court practice of denying jury trials in employer claims of immunity under the state's Workmen's Compensation Law should not be followed in a federal diversity action. *Byrd*, 356 U.S. at 538. Illinois' practice of not giving a nontaxability instruction is, like the South Carolina immunity practice, "not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* at 536. Relying on *Byrd*, the court below correctly held that "the district court . . . is free to give the tax instruction despite contrary state procedure." *In re Air Crash Disaster*, 701 F.2d at 1200.

Ignoring the painstaking analysis of the court below and hopelessly confusing and conflating the two issues decided by that court, the petitioners argue that a writ of certiorari should be granted on three grounds. Petitioners first argue that post-*Liepelt* Illinois Appellate Court decisions have reaffirmed the validity of the practice of refusing a nontaxability jury instruc-

tion in non-FELA state court actions and the Illinois Supreme Court has not reviewed those decisions. Haider Petition at 19, 21; Kahl Petition at 9. Second, petitioners contend that the rule refusing the jury instruction is substantive, a federal court is without authority to question it, and, as a result, the decision below "threatens the entire structure upon which the federal court system is based." Kahl Petition at 10, 9, 11, 13. Finally, the petitioners argue that a writ of certiorari should be granted because the decision of the court to allow the giving of a nontaxability jury instruction is, in the words of the Kahl Petition, "overwhelmingly 'outcome determinative.'" Kahl Petition at 10; *see also* Haider Petition at 20. The petitioners' contentions rest on a profound misunderstanding not only of the decision of the court below but of the decisions of this Court in and after *Erie* and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

The issue before the court below was whether a federal district court in a diversity action controlled by Illinois law could give a jury instruction which reflects Illinois substantive law to limit wrongful death awards to actual pecuniary loss even though the instruction is not given in Illinois courts. In finding in the affirmative, the Seventh Circuit was not representing that the state court practice is not followed in Illinois or that its holding would (or even should) be adopted by Illinois courts. Presumably, judges in state courts in South Carolina still decide employer immunity defenses even though such cases are tried with juries in federal courts sitting in South Carolina diversity actions. Similarly, states with statutes or rules requiring twelve-man juries do not change their statutes or rules because a federal district court has held that it is not bound to follow the state practice in diversity actions and will use a six-man jury. *See, e.g., Palmer v. Ford Motor Co.*, 498 F.2d 952, 954-56 (10th Cir. 1974). It is, in short, utterly irrelevant to the soundness and validity of the Seventh Circuit's decision that, even if true, "various Illinois appellate courts have rejected the *Liepelt* income tax instruction outright, forcefully and unambi-

guously,"³ that the "Illinois Supreme Court has not granted leave to appeal as to any of those decisions,"⁴ and that a standing committee of the Illinois Supreme Court has not adopted a standard instruction on the nontaxability of jury awards. Haider Petition at 21. The Seventh Circuit did not "brush aside" post-*Liepert* state court decisions (Kahl Petition at 9); post-*Liepert* state court decisions are simply irrelevant.

Nor did the Seventh Circuit cavalierly "disregard" Illinois "substantive law" because it "disagree[d]" with its reasoning or rationale. Kahl Petition at 11. The Seventh Circuit carefully analyzed the practice of refusing the nontaxability jury instruction and discovered that only "substantive law" underlying the practice was not even Illinois law but federal law. Because the sole substantive basis of the Illinois Supreme Court's rejection of the nontaxability rule was federal, not state law, the Seventh Circuit not only had a right to review its validity but had an obligation to do so. *Delaware v. Prouse*, 440 U.S. at 653. The Seventh Circuit did not merely find that the rule enunciated in *Hall* was "unsound"; the Seventh Circuit found and correctly held that the interpretation of federal law underlying it was wrong. Petitioner Kahl is quite correct when she says that a federal court cannot disregard substantive state law. Substantive state law has not, however, been abandoned in the Seventh Circuit's decision. Illinois' Wrongful Death Act explicitly limits recovery to "fair and just compensation with reference to the pecuniary injuries resulting from . . . [the wrongful] . . . death." Wrongful Death Act § 2, Ill. Rev. Stat. ch. 70, § 2 (1981).

³ It is difficult to understand how the petitioner can characterize as outright, forceful, and unambiguous rejection appellate court holdings which found that the instruction is "not required" and that it is "not error" to refuse to give the instruction. See *supra* p. 10.

⁴ Only *Ciborowski*, *supra*, involved a petition for leave to appeal to the Illinois Supreme Court. That petition was denied. *Johnson, Christou*, and *Newlin* all settled without further appeal. Telephone interviews with the offices of William J. Harte, Ltd.; Diver, Bollman, Grach, Quade & Lessman; William D. Maddox & Associates; and Johnson, Martin & Russell (July 22, 1983).

"[F]air and just compensation with reference to pecuniary injuries"—i.e., the substantive law of Illinois—does not sanction windfall tax bonuses in jury awards any more than Congress intended to give such bonuses. See *Liepert*, 444 U.S. at 496 n.10. In permitting the district court to give the instruction which Illinois courts consider superfluous, the Seventh Circuit was choosing the manner and method by which substantive Illinois law would be conveyed to the jury. See Fed. R. Civ. P. 51. It was not, as this Court found the Fifth Circuit had done in not following Texas' choice-of-law rule in a diversity action, engrafting "exceptions or modifications" on a state rule which determines (or is determined by) substantive state law. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). There is neither analogy nor application when a federal court refuses to apply a state's substantive choice-of-law rules in a diversity action and when a federal court rules that a district court may give a jury instruction in a diversity action under Rule 51 of the Federal Rules of Civil Procedure which is in accord with substantive state law. The decision of the court below does not "preempt state law" and challenge "the continuing validity of . . . *Erie*"; "the entire structure upon which the federal court system is based" is not "threatened." Haider Petition at 7; Kahl Petition at 5, 10.

Erie lives. So, too, does *York*, *supra*, in which this Court first declared that, in diversity actions, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." 326 U.S. at 109. Essentially ignoring the decisions of this Court which have refined and developed both the "substantive-procedural" distinction of *Erie* and the *York* outcome-determinative test, Petition Kahl calls the Seventh Circuit's opinion "overwhelmingly 'outcome determinative,'" and Petitioner Haider asks: "Is the income tax instruction 'outcome determinative' or not? If it is, then regardless of the evidence issue, the Court of Appeals' decision in that regard must be reversed." Kahl Petition at 10; Haider Petition

at 20. Because the giving of the instruction may result in lower verdicts, Petitioner Haider concludes that the instruction is "outcome determinative" and the rule refusing the instruction cannot, therefore, be procedural. In point of fact it is both and, under the decisions of this Court, can and should be given by a federal court in a diversity action governed by Illinois law. Writing for the Court in *Byrd*, Mr. Justice Brennan acknowledged that the outcome of a trial by jury very well could be different than one heard by a judge. "We do not think," he held, "the likelihood of a different result so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest in uniformity of outcome." 356 U.S. at 540. Directly confronting a conflict between a state rule and Rule 4(d)(1) of the Federal Rules of Civil Procedure, this Court observed that "every procedural variation is 'outcome-determinative'" and held "Rule 4(d)(1) is valid and controls the instant case." *Hanna v. Plumer*, 380 U.S. 460, 468, 474 (1965). Because Illinois' rule refusing to give a nontaxability instruction, like the rule in *Byrd*, is not tied to a substantive state interest and because the federal judiciary cannot protect or perpetuate in federal court a state's mistaken interpretation of federal law, there exists no reason why the Seventh Circuit should have "yield[ed] to the state rule in the interest in uniformity of outcome." *Byrd*, 356 U.S. at 540. Furthermore, since the Illinois rule is procedural, followed in state court only because the instruction is deemed unnecessary and "not required," an actual difference in outcome in jury awards between state and federal diversity wrongful death actions is questionable at best. Even so, regardless of the outcome, because it is procedural, the state rule should yield in federal diversity cases to Rule 51 of the Federal Rules of Civil Procedure which gives the district court the power to permit or refuse a jury instruction. Finally, even if there were to be a difference in the awards of juries given the nontaxability instruction and those not given the instruction, the award of the jury given the instruction would be the award most in accord with substantive Illinois law.

Just as the Seventh Circuit did not "apply *Liepert*" in predicting how the Illinois Supreme Court would rule if faced with the issue of whether a decedent's tax liability is admissible in a wrongful death action, the Seventh Circuit did not "apply *Liepert*" when it ruled that the district court erred in holding that it could not give an instruction on the nontaxability of jury awards. The district court was not asked to apply federal law in a diversity case but to give an instruction which, while not given in Illinois state courts, is completely consistent with substantive Illinois law. Fully supported by the rulings of this Court, the decision of the Seventh Circuit rests solely on the court's analysis of the state's practice. That decision applies only to diversity cases governed by Illinois law and is not in any sense a preemption of state law by a federal common law.

III.

The Seventh Circuit's decision is in full conformity with the decisions of other federal courts.

Since this Court's decision in *Liepert*, a number of federal courts have considered the admissibility of evidence of a decedent's tax liability and the giving of a nontaxability jury instruction in diversity actions. In an effort to have her petition granted, Petitioner Kahl suggests that "the opinion of the Seventh Circuit in this case . . . disagrees with its sister circuits . . ." Kahl Petition at 7. It does not.

Without exception, every federal court which has considered the admissibility of a decedent's tax liability in a diversity action has, as did the court below, looked to state law. In *Lin, supra*, the United States District Court for the Southern District of New York looked to New York's Court of Appeals and intermediate courts and found no controlling law.⁵ As did the

⁵ In reaching this conclusion, the court distinguished *Vasina v. Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981), which had held that

(Footnote continued on following page)

Seventh Circuit, the *Lin* court predicted that the New York Court of Appeals would admit such evidence. In *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154, 1158-59 (1st Cir. 1980), a wrongful death diversity action, the First Circuit looked to New Hampshire law, found none, and held that the district court judge had not erred in excluding such evidence based on the "majority rule." *Id.* at 1159. Finding that Louisiana law permits the use of "gross income, net income, or any figure in between that was reported on the victim's last tax return as a representation of his statement of wage," the Fifth Circuit held that the trial court had not erred in not allowing evidence of net income. *Fenasci v. Travelers Insurance*, 642 F.2d 986, 989 (5th Cir. 1981). The United States District Court for the District of Colorado in a personal injury/wrongful death action looked to the Colorado Supreme Court for guidance in determining "whether plaintiffs' alleged damages . . . [would] . . . be affected by any possible income tax liability." *Gerbich v. Evans*, 525 F. Supp. 817, 819 (D. Colo. 1981). Although the Colorado Supreme Court had not confronted the issue, the Colorado Court of Appeals had "upheld a trial court decision excluding evidence of the effects of plaintiff's loss of earning capacity on his income taxes." *Id.* The evidence in *Gerbich* was excluded. All five courts, including that below, applied either state law (*Fenasci* and *Gerbich*) or what they perceived state law to be (*Spinosa*) or what they predicted state law would be (*Lin* and *In re Air Crash Disaster*). That the outcomes were different stems not from any conflict among them but from differences in state law.⁶

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New York law would not permit the admission of evidence of a decedent's tax liability. *Vasina*, the court held, had relied on a case which had not even considered the issue of such admissibility. *Lin*, 3 Av. L. Rep. at 18,287.

⁶ In *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980), cert. denied sub nom. *Bromley Corp. v. Cortese*, 450 U.S. 981 (1981), the

(Footnote continued on following page)

Similarly, post-*Liepelt* decisions which have determined the propriety of giving the nontaxability jury instruction in diversity actions have—as did the decision of the court below—involved an analysis of state law. See, e.g., *Grant v. City of Duluth*, 672 F.2d 677, 683 (8th Cir. 1982) (recognizing that the question was governed by state law, the court held that, absent a decision from the Minnesota Supreme Court following *Liepelt*, the district court should give nontaxability instruction on retrial of the case); *Vasina v. Grumman Corp.*, 644 F.2d at 118 (New York Court of Appeals has ruled that the nontaxability instruction should not be given and was properly refused by the district court); *Croce v. Bromley Corp.*, 623 F.2d at 1096 (district court's refusal to give instruction would not constitute reversible error under Louisiana law); *Gerbich v. Evans*, 525 F. Supp. at 819 (“The Colorado Court of Appeals has twice upheld trial court refusals to give proffered jury instruction that awards would not be taxable”). Again, the differences among the courts in permitting and in not permitting the nontaxability instruction reflects not a conflict among federal courts but differences in state law. The differences in state law are not grounds for granting certiorari.

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Fifth Circuit faced the slightly different issue of whether evidence of the decedent's future loss of income was properly admitted by the district court in a diversity action even though it would not be admitted in state court. The court held that, because such evidence was relevant under Louisiana law, it was properly admitted under Rule 403 of the Federal Rules of Evidence. *Id.* at 1094. See *supra* note 2.

CONCLUSION

The Seventh Circuit's decision begins and ends with Illinois law. From its thorough examination of that law, the court correctly concluded that, if presented with the issue, the Illinois Supreme Court would admit evidence of a decedent's income tax liability in a wrongful death action. The court also correctly determined that Illinois' practice of refusing to instruct a jury that any damages it might award are not taxable was conceived in a mistaken interpretation of federal law and nurtured for administrative reasons. The court's holding that the Illinois rule does not prohibit a federal court from giving the instruction in a diversity action is mandated both by *Erie* and its progeny and by substantive Illinois law. The Seventh Circuit did not err in reversing the decision of the district court. The petitions for a writ of certiorari must be denied.

Respectfully submitted,

THOMAS D. ALLEN

ROBERT E. HALEY

RUTH E. VAN DEMARK

*Attorneys for Respondent,
American Airlines, Inc.*

Of Counsel:

WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400